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IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO THE FLORIDA RULES OF CIVIL PROCEDURES—CIVIL WORKGROUP REFERRAL TO THE CIVIL PROCEDURE RULES COMMITTEE (RULES 1.200, 1.201, 1.280, 1.440, AND 1.460)
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Case No. SC2023-0962

COMMENT BY THE FLORIDA JUSTICE REFORM INSTITUTE

The Florida Justice Reform Institute ("FJRI") is the state's leading organization of concerned citizens, business owners and leaders, doctors, and lawyers who seek the adoption of fair legal practices to promote predictability and personal responsibility in the civil justice system. FJRI represents a broad range of businesses who share a substantial interest in a litigation environment that secures the just, speedy, and inexpensive determination of civil disputes.

While FJRI commends the Florida Bar Civil Procedure Rules Committee (the "Committee") for its work in drafting Track A—which improves upon many of the unworkable proposals offered previously by the Workgroup on Improved Resolution of Civil Cases (the "Workgroup")—FJRI opposes the proposal in Track A requiring supplementation of discovery in Florida Rule of Civil Procedure

1.280(g).

FJRI also asks the Court to consider two revisions to the Florida Rules of Civil Procedure not proposed by the Committee that would vastly improve civil litigation in Florida and better effectuate the goals of ensuring the fair and timely resolution of civil cases through effective case management and the promotion of accountability. Specifically, this Court should: (1) revise Florida Rule of Civil Procedure 1.280 to state that discovery must be proportional to the needs of the case, in line with the comparable federal rule; and (2) require the disclosure of third-party litigation financing agreements under Rule 1.280(a)(1).

A. Requiring Ongoing Monitoring and Supplementation of Discovery Responses Would Impose an Untenable Burden on Parties

It has been well-established in Florida since 1972 that there is no duty to supplement discovery responses. *See In re Fla. Bar*, 265 So. 2d 21 (Fla. 1972). If a discovery response is accurate and complete when made, the responding party's job is done; the need to supplement a response can be drawn as necessary by the inquiring party through a subsequent discovery request. *See* Fla. R. Civ. P.

1.280(f).

The Committee's proposal would impose a duty to supplement any and all discovery responses, including the initial mandatory discovery disclosures proposed by the Committee, upon learning that "in some material respect the [prior] disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." Track A, Proposed Fla. R. Civ. P. 1.280(g). This will impose a significant and unrealistic burden on all parties, but particularly large corporate entities. A party will bear the ongoing responsibility for periodically recanvassing new information that just might be responsive to prior discovery requests or disclosures, a costly and time-consuming endeavor divorced from considerations of case complexity or subsequent immateriality. The burdens of requiring endless supplementation of discovery seem counterproductive to the desired goals of streamlining of litigation and reducing discovery costs and attorneys' fees.

B. The Court Should Require Proportionality in Discovery

The Committee expressly declined to propose one change that

might actually address the burdensomeness of discovery in civil cases: proportionality. While acknowledging that several Committee members favored adopting the proportionality language set forth in Federal Rule of Civil Procedure 26(b)(1), the Committee decided not to recommend its adoption because "the Workgroup did not recommend [it], this Court's referral letter did not request it, and proportionality is already addressed in other parts of the civil rules." Fast-Track Report of the Civil Procedure Rules Committee at 10. FJRI disagrees with both the suggestion that this issue is beyond the scope of this proceeding and the assertion that proportionality is already required by other civil rules. This Court should expressly require consideration of proportionality in discovery, just as the Federal Rules of Civil Procedure require.

Under Federal Rule of Civil Procedure 26(b)(1), the scope of discovery is defined as "any nonprivileged matter that is relevant to any party's claim or defense and ***proportional to the needs of the case***." Fed. R. Civ. P. 26(b)(1) (emphasis added). Proportionality is assessed by "considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to

relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." *Id.* As Chief Justice John Roberts explained, Federal Rule 26(b)(1) "states, as a fundamental principle, that lawyers must size and shape their discovery requests to the requisites of the case. Specifically, the pretrial process must provide parties with efficient access to what is needed to prove a claim or defense, but eliminate unnecessary or wasteful discovery." 2015 Year-End Report on the Federal Judiciary at 7.[1]

Put simply, proportionality is the common-sense consideration of what magnitude of discovery makes sense in a given case. Requiring proportionality in discovery has worked in the federal system, and nothing suggests it would not work in Florida. Expressly incorporating the concept of proportionality into Florida Rule of Civil Procedure 1.280 would bring Florida in line with the federal rules, similar to what the Court has already accomplished in adopting the

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[1] *Available at* https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf.

federal standards for expert testimony and for deciding motions for summary judgment. *See In re Amends. to Fla. R. Civ. P. 1.510*, 317 So. 3d 72, 74-75 (Fla. 2021) (largely replacing Florida's summary judgment rule with Federal Rule of Civil Procedure 56 and the federal summary judgment standard established in the *Celotex* trilogy); *In re: Amends. to Fla. Evid. Code*, 278 So. 3d 551, 551-52 (Fla. 2019) (replacing *Frye* standard for admitting expert testimony with the *Daubert* standard).

As the Sedona Conference observed, "[a]chieving proportionality in civil discovery is critically important to securing the 'just, speedy, and inexpensive resolution of civil disputes' as mandated by Federal Rule of Civil Procedure 1." The Sedona Conference, *Commentary on Proportionality in Electronic Discovery*, 18 Sedona Conf. J. 141, 147 (2017). The same is true for achieving the identical goal of the "just, speedy, and inexpensive determination" of every case under Florida Rule of Civil Procedure 1.010. Accordingly, FJRI asks the Court to adopt the concept of proportionality in Florida Rule of Civil Procedure 1.280 by incorporating the relevant language of Federal Rule of Civil Procedure 26(b)(1) ("Parties may obtain discovery regarding any

nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.").

C. The Court Should Require Disclosure of Third-Party Litigation Financing Agreements

FJRI also invites the Court to amend Florida Rule of Civil Procedure 1.280 to require disclosure of third-party litigation financing agreements as part of any mandatory initial disclosure requirement.

Litigation finance is a relatively new industry composed of institutional investors who invest in litigation by providing finance in return for an ownership stake in a legal claim and a contingency in the recovery. This in turn enables parties to shift the financial burden of legal disputes off their own balance sheets and minimize the risk of pursuing litigation.

But the practice also increases the probability that meritless claims will be brought, inserts questions about who is actually controlling the litigation other than the plaintiff and defendant, results in inevitable conflicts of interest among the lawyer, client, and litigation financier, and makes settling lawsuits far more difficult and expensive. *See* American Bar Association Best Practices For Third-Party Litigation Funding at 6 (Aug. 2020) ("When portfolio financing is involved, the possibility of tensions, and even concrete conflicts of interest, may arise if the lawyer or a single client begins to have difficulties with the funder involving one of a group of matters.").[2]

Florida courts permit these types of arrangements, *see Kraft v. Mason*, 668 So. 2d 679, 684 (Fla. 4th DCA 1996), and as a consequence, Florida has been cited as an attractive state for investing in litigation, particularly given its size. *See* Michael McDonald, Above the Law, *The Best and Worst States for Litigation Finance (Part II)* (July 11, 2017).[3] So long as these arrangements are

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[2] *Available at* https://www.americanbar.org/content/dam/aba/directories/policy/annual-2020/111a-annual-2020.pdf.

[3] *Available at* https://abovethelaw.com/2017/07/the-best-and-worst-states-for-litigation-finance-part-ii/.

allowed, the parties and the courts should be permitted to know whether third parties are driving litigation decisions. *See, e.g.*, Anusheh Khoshsima, *Malice Maintenance is "Runnin' Wild": A Demand for Disclosure of Third-Party Litigation Funding*, 83 Brook. L. Rev. 1029, 1053-54 (2018) ("With the court finally aware of the presence of the third-party funder, it will have the opportunity to address any suspicious legal strategies and hold lawyers accountable. Requiring disclosure of any personal interest in the lawsuit will ensure that the court is privy to any improper personal agenda or serious conflicts of interest." (internal footnotes omitted)).

This is not much different than requiring the disclosure of any insurance policy which may be used to satisfy the judgment or indemnify a party, a disclosure requirement the Committee already recommends. *See* Track A, Proposed Fla. R. Civ. P. 1.280(a)(1)(D). Requiring disclosure of third-party litigation funders would also put Florida in line with the best practices recommended by the American Bar Association and several state and federal courts. *See* Patrick A. Tighe, *Memorandum: Survey of Federal and State Disclosure Rules*

Regarding Litigation Funding 209 (Feb. 7, 2018);[4] U.S. Gov't Accountability Office, *Third-Party Litigation Financing: Market Characteristics, Data, and Trends* 27-29 (Dec. 2022).[5]

For all these reasons, FJRI supports amending Proposed Rule 1.280(a)(1) to mandate disclosure of any third-party litigation funding agreement. That is, a party should be required to disclose "a copy of any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on and sourced from any proceeds of the civil action, by settlement, judgment, or otherwise."

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FJRI commends the Court for its careful study and review of these proposed revisions to the Florida Rules of Civil Procedure. While the Committee's Track A proposal certainly improves upon the proposals initially offered by the Workgroup, the Institute supports adoption of Track A only with the following revisions: elimination of

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[4] *Available at* https://judicialstudies.duke.edu/wp-content/uploads/2018/04/Panel-5-Survey-of-Federal-and-State-Disclosure-Rules-Regarding-Litigation-Funding-Feb.-2018.pdf.
[5] *Available at* https://www.gao.gov/assets/gao-23-105210.pdf.

the requirement to supplement discovery, requiring proportionality in discovery, and requiring disclosure of third-party litigation funding agreements.

Thank you for your consideration.

Respectfully submitted on September 29, 2023.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 29, 2023, a copy of the foregoing has been filed with the Florida Courts E-Filing Portal and served on the Committee Chair, Judson Lee Cohen, 100 Biscayne Boulevard, Suite 2802, Miami, FL 33132, jcohen@weinsteincohen.com, and on the Bar Staff Liaison to the Committee, Heather Telfer, 651 E. Jefferson Street, Tallahassee, Florida 32399, htelfer@floridabar.org.

/s/ William W. Large
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